

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

George Eric Rosden,

Appellant,

vs.

A. Leuthold,

Appellee.

Case No. 15153

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED AUG 24 1959

802

Joseph W. Stewart
CLERK

**Appeal from judgment of the United
States District Court for the
District of Columbia.**

**Robert S. Caviness
Counsel for Appellant
110 C Street
Washington 1, D. C.**

QUESTIONS PRESENTED

First: Whether in granting appellant judgment on his counterclaim the District Court should have allowed appellant \$2, 687. 75 (the true principal sum due from appellee) instead of \$2, 182. 23 (the amount mentioned in the counterclaim, incorrectly computed by appellant prior to trial)?

Second: Whether, in the absence of any contract or agreement therefor, the District Court acted correctly in granting appellee judgment for attorney's fees in the sum of \$1, 000. 00?

Third: Whether the District Court should have granted appellant interest on his counterclaim from the date the principal sum became due and payable, to wit, June 8, 1950?

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

George Eric Rosden,

Appellant,

vs.

A. Leuthold,

Appellee.

Case No. 15153

Counsel for Appellee:

N. Meyer Baker
710 Metropolitan Building
Washington 5, D. C.

Counsel for Appellant:

Robert S. Caviness
110 C Street
Washington 1, D. C.

Jurisdictional Statement

The suit as filed in the United States District Court for the District of Columbia involved more than \$3,000.00 and appellant, defendant below, was duly served with a copy of the complaint within the District of Columbia. Jurisdiction of the District Court stems from Sec. 11-306 of the District of Columbia Code, 1951 Ed. Jurisdiction of this Court stems from Sec. 1291, Title 28, of the United States Code.

Statement of the Case

Leuthold, plaintiff below, sued Rosden for \$4,700.00, being the face amount of three bills of exchange. Rosden had refused payment of the bills of exchange when they became due in 1956. Rosden's refusal was based on the fact that he had executed the bills under duress in Switzerland, and that under Swiss law they thereby became void or voidable. (Complaint and Answer).

In his Answer Rosden set forth a counterclaim against Leuthold for \$2,182.23 plus interest from June 1, 1950. This counterclaim resulted from a note made by Leuthold and endorsed for accommodation by Rosden. Said note, in the face amount of \$12,000.00, plus interest and costs of \$311.29, was paid by Rosden on June 8, 1950, after Leuthold had defaulted. From June 1950 to November 5, 1954, Leuthold made

partial payments to Rosden against this indebtedness totaling \$9,623. 54. When Leuthold filed the suit below he was indebted to Rosden in the sum of \$2, 687. 75 plus interest from June 8, 1950, as a result of this note transaction. (Def. Ex. 4 and Tr. 50-52, 56, 58, 59-61, 153-155)

At the conclusion of the hearing on January 9 the Court stated that it found in favor of Leuthold for \$4, 700. 00 plus a reasonable sum for attorney's fees. It found in favor of Rosden on his counterclaim in the sum of \$2, 182. 33. The Court specifically refused to entertain a motion changing the amount of the counterclaim to the correct amount, \$2, 687. 75. (Tr. 155-158)

The Court instructed counsel for Leuthold to prepare findings, conclusions and judgment, which the Court signed on January 20th. On January 19th counsel for Rosden filed a Motion to modify the proposed findings, conclusions and judgment in two respects. First, by eliminating all reference to attorney's fees for counsel for Leuthold. Second, by permitting Rosden to change his counterclaim from \$2, 182. 23 to the true figure of \$2, 687. 75. Such Motion was denied.

On January 28th Rosden filed a Motion to amend the findings and judgment so as to grant him interest on his counterclaim from the date the obligation became due and payable, to wit, June 8, 1950. This Motion was likewise denied.

Statement of Points
and Argument

First Point: The Trial Court erred in refusing to permit appellant to amend the amount of his counterclaim from \$2, 182, 23 to the correct amount of \$2, 687. 75 --- or, alternatively, in failing to grant appellant judgment for said correct amount.

In his answer appellant obviously made an error in computing the amount remaining unpaid in connection with the \$12, 000 note. This first became apparent to appellant's counsel during the hearing. Appellant produced a record of payments received from appellee which clearly evidenced the amount remaining unpaid as \$2, 687. 75 (Def. Ex. 4). Appellee produced no evidence on this issue.

Rule 15 b of the Federal Rules of Civil Procedure states in pertinent part:

"Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment * * * "

Rule 54 c, F. R. C. P., states as follows:

" * * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. "

Comment on both these rules in Moore's Federal Practice (Vol. 3, p. 805 and Vol. 6, pp. 1209, 1210 and 1211) indicate they are generally applied liberally and for the purpose of mitigating errors in pleading. The Court below clearly acted in contravention of these rules in refusing to entertain a verbal motion to amend the counter-claim during the hearing and denying defendant's motion to amend the findings and judgment.

Second Point: The Trial Court erred in granting appellee judgment for attorney's fees.

There was no agreement between the parties that either would reimburse the other for attorney's fees in the event of litigation. This was definitely an action at law, not in equity. In the absence of an agreement, and excepting certain types of actions in equity, attorney's fees are not allowable to either party. Cahill vs. Bryan, 87 US App. D. C. 271, 184 F.2d 277; Van Senden vs. Wilkinson, 64 US App. D. C. 174, 76 F.2d 151; Flaherty, D. C. Practice, Secs. 849 and 868; 14 American Jurisprudence, Costs Sec. 63; 15 American Jurisprudence, Damages, p. 551.

Third Point: The Trial Court erred in failing to grant appellant judgment for interest on his counterclaim from June 8, 1950.

In the Answer appellant demanded judgment " * * * in the sum of \$2,182.23 plus interest from June 1, 1950." At the hearing appellant produced evidence that he paid the note on behalf of appellee on June 8th and not on June 1st. No contradictory evidence on this point was offered by appellee. Appellant is entitled to compensation for the loss of use of his funds, which loss commenced on June 8, 1950.

" * * * the general rule is that a party is entitled to interest on an amount which he lends to another or advances for his benefit, although nothing was said about interest at the time of the transaction." Corpus Juris Secundum, Interest, Sec. 10, Vol. 47, p. 22.

To the same effect: Young v. Godbe, 82 US 562, 21 L. Ed. 250, cited and applied in U. S. v. United Drill and Tool Corp., 87 US App. D. C. 236, 183 F.2d 998.

Conclusion

It is respectfully submitted that the District Court erred on each of the three points discussed above. Appellant requests this Court to correct such errors.

Robert S. Caviness
Counsel for Appellant
110 C Street
Washington 1, D. C.

I certify that a carbon copy of the foregoing brief and the annexed joint appendix was mailed, postage prepaid, to Counsel for Appellee, N. Meyer Baker, Esq., at 710 Metropolitan Building, Washington 5, D. C., this 18th day of August, 1959.

**JOINT
APPENDIX**

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IN THE UNITED STATES COURT OF APPEALS
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vs.

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Case No. 15153

Appeal from judgment of the United
States District Court for the
District of Columbia

JOINT APPENDIX

RECEIVED BY THE UNITED STATES DEPARTMENT OF THE INTERIOR

THE BUREAU OF LAND MANAGEMENT

DEPT. OF THE INTERIOR

WASHINGTON, D. C. 20460
BUREAU OF LAND MANAGEMENT
U. S. DEPARTMENT OF THE INTERIOR

WILSON, N. C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

A. Leuthold,	)	
Plaintiff,	)	
	)	Civil Action
v.	)	
	)	No. 4627-56
George Eric Rosden,	)	
Defendant.	)	

PERTINENT DOCKET ENTRIES IN THE DISTRICT COURT

Dec. 7, 1956	Complaint for Money Judgment
Dec. 12, 1956	Complaint Served on Defendant
Dec. 31, 1956	Answer
Mar. 13, 1957	Deposition of G. E. Rosden
Apr. 8, 1957	Plaintiff's Motion for Summary Judgment
May 1, 1957	Foregoing Motion Granted — McGuire, J.
May 13, 1957	Motion to Vacate Summary Judgment
May 24, 1957	Foregoing Motion Granted — McGuire, J.
Oct. 3, 1957	Cause Calendared
Nov. 5, 1958	Pretrial, Youngdahl, J.
Jan. 20, 1959	Findings, Conclusions and Judgment — Sirica, J.
Jan. 20, 1959	Defendant's Motion to Modify Findings and Conclusions, Denied — Sirica, J.
Jan. 29, 1959	Motion to Amend Findings and Judgment

Jan. 31, 1959 Foregoing Motion Denied — Sirica, J.
 Feb. 19, 1959 Notice of Appeal by Defendant
 Mar. 16, 1959 Order Staying Execution of Judgment Pending Appeal

Filed Dec. 7, 1956

COMPLAINT FOR MONEY JUDGMENT

(Unpaid Bills of Exchange)

1. The jurisdiction of this Court obtains because the amount claimed herein is more than Three Thousand (\$3000.00) Dollars.

2. Defendant executed and delivered to the Plaintiff three (3) certain bills of exchange described as follows:

- a. A bill of exchange dated May 20, 1956 for Two Thousand (\$2000.00) Dollars due and payable in Washington, D. C. on July 16, 1956.
- b. A bill of exchange dated June 20, 1956 for Two Thousand (\$2000.00) Dollars due and payable in Washington, D. C. on August 15, 1956.
- c. A bill of exchange dated July 20, 1956 for Seven Hundred (\$700.00) Dollars due and payable in Washington, D. C. on September 15, 1956.

Copies of the afore-mentioned bills of exchange are hereto attached and by reference incorporated herein.

3. In accordance with the tenor of each of the above-described bills of exchange, they were duly and regularly presented to the Defendant for payment and upon his refusal to pay same, said instruments were duly protested as shown by the attached copies of said protests.

WHEREFORE, Plaintiff demands judgment against the Defendant for the sum of Forty-Seven Hundred (\$4700.00) Dollars, plus interest on Two Thousand (\$2000.00) Dollars from July 16, 1956 to date of judgment, plus interest on Two Thousand (\$2000.00) Dollars from August 15, 1956 to date of judgment, plus interest on Seven Hundred (\$700.00) Dollars from September 15, 1956, plus a reasonable attorney's fee, plus protest fees of Six and 75/100 (\$6.75) Dollars, besides costs of this suit.

MERCIER, KERTZ, SANDERS & BAKER

By /s/ N. Meyer Baker
Attorneys for the Plaintiff
613 15th Street, N. W., Suite 710
Washington 5, D. C., ME 8-2241

Filed Dec. 31, 1956

* * *

ANSWER

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

There is failure of consideration, no debt being due, and the bills of exchange having been obtained from the defendant in Switzerland under duress.

THIRD DEFENSE

Plaintiff, before and at the time of filing this suit, is indebted to defendant in the sum of \$2,182.23 plus interest from June 1, 1950.

WHEREFORE, defendant demands judgment against plaintiff on this counterclaim for the sum of \$2,182.23, interest and costs.

/s/ George Eric Rosden
George Eric Rosden
1025 Vermont Ave NW
Defendant.

Filed Oct. 3, 1957

* * *

ANSWER TO COUNTER-CLAIM

1. Plaintiff denies each and every allegation of the counter-claim.
2. Plaintiff further states that the counter-claim asserted by the Defendant is barred:
 - a. By the statute of limitations.

- b. By virtue of a mutual release executed by the Defendant in an agreement dated May 3, 1954 and executed at Zurich, Switzerland.

MERCIER, KERTZ, SANDERS & BAKER

By /s/ N. Meyer Baker
613 - 15th Street, N. W. Suite 710
Washington 5, D. C. - ME 8-2241
Attorneys for the Plaintiff

Copy of the foregoing mailed postpaid to Defendant's attorney at his office address of record this 2nd day of October, 1957.

/s/ N. Meyer Baker
Attorneys for the Plaintiff

Filed Jan. 7, 1959

PLAINTIFF'S EXHIBIT 7b

AGREEMENT

Between

Dr. Georg Eric Rosden in Washington

on the one hand

and

Mr. Alfred Leuthold in Zurich

on the other hand

there takes place today the following agreement:

For the purpose of final settlement of the joint purchase of pictures, Dr. Rosden gives to Dr. Dessauer as trustee the following bill of exchange:

31 October	1954	\$2000. -
30 November	1954	\$2000. -
31 December	1954	\$2000. -
31 January	1955	\$2000. -
28 February	1955	\$2000. -
31 March	1955	\$2000. -
30 April	1955	\$3500. -
31 July	1955	\$4000. -
31 October	1955	\$4000. -
31 January	1956	\$4000. -
30 April	1956	\$4500. -

Dr. Dessauer is herewith authorized by both parties to set the making date according to his fair discretion. All mutual claims of any sort and based upon any legal title which Dr. Rosden may assert against Mr. Leuthold and vice versa, are herewith discharged.

The three pictures in the possession of Dr. Rosden may not be sold nor mortgaged until the payment of the last bill of exchange and will be held as collateral for Mr. Leuthold along with the personal pledge of Dr. Rosden for the prompt payment of the bill,

Zurich, May 3, 1954

/s/ Dr. Georg Eric Rosden

Dr. Georg Eric Rosden

/s/ A. Leuthold

Filed Jan. 7, 1959

PLAINTIFF'S EXHIBIT 8

No. 58/5341

UNITED STATES OF AMERICA

DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I Certify That Adolfo Spargnapani was duly recognized as Consul of Switzerland at Washington, D. C. on August 2, 1955 by the Government

of the United States of America, and his recognition continues in full force at the present time. *

[SEAL]

In testimony whereof, I, JOHN FOSTER DULLES,
Secretary of State, have hereunto caused the
seal of the Department of State to be affixed and my
name subscribed by the Acting Authentication Officer
of the said Department, at the city of Washington, in
the District of Columbia, this twenty-fourth day of
November, 1958.

(* For the contents of the annexed)
(document the Department assumes) /s/ John Foster Dulles
(no responsibility)) Secretary of State.

By /s/ Pattie H. Field
Acting Authentication Officer,
Department of State.

58/5341

AMBASSADE DE SUISSE

November 14th, 1958

This is to certify that the following portion of the Swiss Consti-
tution was the law of Switzerland in 1956:

* * *

The inofficial English translation reads as follows:

- Art. 59: Suits for personal claims against a solvent debtor domiciled in Switzerland must be brought before the judge of his place of domicile; consequently the property of such a person may not be attached by reason of personal claims outside the canton in which he is domiciled.

These provisions are, in respect of foreigners, without prejudice to the provisions of international treaties.

Imprisonment for debt is abolished.

EMBASSY of SWITZERLAND:

/s/ A. Spargnapani
A. Spargnapani, Consul

\$ 4. 60
Pos. 6 f
Nr. 200

[SEAL]

[STAMP]

Filed Jan. 7, 1959

DEFENDANT'S EXHIBIT 4

Law Offices Of
GEORGE ERIC ROSDEN
Washington 5, D. C.

June 8, 1950	note paid	12,000.00	
	costs sfrcs. 1330.75	311.29	
June 27, 1950	received		2,062.40
July 25, 1950	received net		6,616.14
October 21, 1950	received from Chicago		105.00
Jan. 25, 1952	received from Chicago		281.25
June 29, 1953	received from Chicago		315.00
Jan. 28, 1954	received from Chicago		105.00
November 5, 1954	received from Chicago		138.75
balance			2,987.75
		12,311.29	12,311.29

DIRECT EXAMINATION OF WITNESS ROSDEN

* * *

TR 3 Q Your profession? A I am a lawyer.

Q At which bar, I meant to say.

A The Bar of this court, of the Court of Appeals, the United States Supreme Court.

* * *

TR 19 THE COURT: Now, this gentleman knows what hearsay testimony is. He is a member of the bar of the Supreme Court of the United States and he knows what hearsay testimony is as well as counsel for the defendant and counsel for the plaintiff and the Court does.

I want this witness to testify. I am not trying this case. I am sitting here in the capacity of a judge and a jury.

This witness should confine his testimony to what he knows of his own knowledge, not what a curator told him. The plaintiff is not here and counsel for the plaintiff certainly can't cross examine some man we don't know anything about.

* * *

TR 32 THE COURT: Just a minute. I want the record to show that this is the rankest kind of hearsay. I don't think it has been definitely

established yet that Doctor Dessauer was the plaintiff's agent or had any authority to bind him by any statements made out of his presence.

This agreement states as follows:

Doctor Dessauer is herewith authorized by both parties to set the making date according to his fair discretion.

The word "exhibiting" or "exhibition" is marked out and in pencil it is written over the top "making day." I don't exactly know what that means. I suppose to exhibit some. That is apparently what that means.

Then it is stated:

All mutual claims of any sort and based upon any legal title which Doctor Rosden may assert against Leuthold, and vice versa, are herewith discharged.

Now, you are offering testimony, a statement made by Doctor Dessauer to this defendant out of the presence apparently of the plaintiff himself, to bind the plaintiff. That is your theory.

* * *

TR 43 Q (By Mr. Caviness) Now, all of these payments listed on Defendant's Exhibit 2 were made as a result of a 1954 contract, were they not?

A That is right. Except the first one, maybe the first one was before. I do not recall.

* * *

TR 49 Q How is it, Mr. Rosden, that you didn't find out sooner that Doctor Dessauer had misinformed you as to the possibility of your detention in Switzerland?

MR. BAKER: If the Court please, I object to it because this again is calling for a conclusion and a lot of speculation.

THE COURT: I understand that. I will permit it; evaluate the testimony at the proper time.

You may proceed.

A Well, of course when I returned from Switzerland in '54, after having this contract, I was rather angry, had the feeling that I had been -- had been had, so to speak.

THE COURT: Feeling you had been what?

TR 50 A That I had been mistreated. But at that time I didn't know of the provisions of Swiss law in question, and moreover, I was financially not tight at all, and figured that if I would let a note go to protest, my credit standing in the community would be damaged to such an extent that I didn't want to incur such a situation. So I did not do anything. That means I neither checked, if I could have done something, nor did I do anything else. I just paid, figuring all right, you have been mistreated, you have lost a substantial amount, now it will have to be digested, so to speak.

Q And your digestion didn't change until -- what was it, August?

THE COURT: I think he has testified to that already.

Q (By Mr. Caviness) Mr. Rosden, with respect to the first counterclaim, you have previously testified, I believe, that in 1950 you endorsed a note for Mr. Leuthold? A That is right.

Q Will you describe to the Court the circumstances that led up to that endorsement?

A Well, I believe I have testified already yesterday that Mr. Leuthold and/or Doctor Dessauer suggested first that I should pay half the amount as if there had been a total loss.

Q Half the amount being what?

TR 51 A Half of \$33,000. Then when I refused that, it was suggested that Mr. Leuthold needed money urgently, it was suggested both by Doctor Dessauer and by Leuthold, and whether -- I do not know whether I suggested it or whether it was suggested by Leuthold or Dessauer, that the paintings should be pledged somewhere in order to get a loan for Mr. Leuthold to use, the proceeds of. I negotiated further with Dessauer personally and finally arrived at the following result upon suggestion of Dessauer: that I would give an accommodation endorsement on a note of Mr. Leuthold in the amount of 50,000 Swiss francs, which is approximately \$12,000. And I did furnish that endorsement.

Q Do you have that note?

A No, I don't. That note was in the hands of Doctor Dessauer after it was paid.

Q Did Mr. Leuthold pay that note? A No.

Q Strike that. I haven't dated this thing yet. Do you recall the date of that note that you have just described?

A It was due about the middle of 1950.

Q Did Mr. Leuthold pay that note when it became due?

A No. Doctor Dessauer notified me by letter that Leuthold could not pay, and that I would have to pay.

TR 52 Q And you subsequently did pay? A Yes.

* * *

TR 56 Q (By Mr. Caviness) Mr. Rosden, do you have a document itemizing the receipts --

May I withdraw that, your Honor, just a moment? I would like to ask a few more questions before we get to the exact amount.

As I understand it, Mr. Rosden, you had to pay this twelve thousand some-odd-dollars on behalf of Mr. Leuthold?

A That is right.

Q And how were you to be reimbursed by Mr. Leuthold?

A Mr. Leuthold --

TR 57 MR. BAKER: If the Court please, I make my same objection.

We are going far afield and there is no materiality to any of this.

THE COURT: This is in support of his counterclaim, as I understand it.

MR. BAKER: But they are talking about \$12,000 now that has nothing to do with the interest claim in the counterclaim.

THE COURT: Does the \$12,000 have anything to do with the counterclaim?

MR. CAVINESS: Sure. It is the balance due against that \$12,000 that we are concerned with, your Honor.

THE COURT: All right.

Your defense to that is the statute of limitations, right?

MR. BAKER: Yes, sir.

MR. CAVINESS: And that is exactly what we are dealing with, what we are leading up to now.

MR. BAKER: As well, if the Court please, one other point that escapes me for the moment, the mutual lease set forth in the contract.

THE COURT: Set forth in which contract?

MR. BAKER: The contract of May 3rd, 1954.

THE COURT: I understand.

(The last question was read by the reporter.)

TR 58 A Mr. Leuthold had certain securities in Chicago that were being held by a Chicago law firm in escrow for a possible tax liability.

Q (By Mr. Caviness) Possible tax liabilities to whom?

A Tax liability to the United States Government on behalf of Leuthold.

Q And how does that enter into the possible reimbursement?

A It was arranged between us.

Q Between who, may I ask?

A It was arranged between Leuthold, Dessauer, and me, that I would be reimbursed out of the amounts that would become free from that, from these securities in escrow, until such time when the liability would be covered.

Q You mean until the full twelve thousand-odd-dollars was repaid?

A Good.

* * *

TR 59

Q This fund in Chicago belonged to Mr. Leuthold, the plaintiff?

A That is right.

Q And would you state specifically how the payments to you were to be made from that fund. A Well, whatever securities --

Q May I interrupt. What do you mean by "securities" now? Were these bonds or something?

A They were bonds and shares, if I recall right, mainly bonds.

Q Go ahead. A Whatever would be released by the trustee, and whatever interest payments would be made, would be made to me and I was to use them to defray this amount from this note that I had advanced. And that in fact was done over a period of a number of years.

Q And when was the trust to expire? Was there any definite limitation on the trust?

TR 60 A The trust was to expire when the seven-year statute of limitations in the Internal Revenue Code will expire. It was either in '55 or '56. I think it was '56 but I am not quite sure.

Q Do you have a list showing the payments you received out of this Chicago trust fund? A Yes, I do.

Q You prepared this? A Yes, I did.

Q And what does this document show?

THE COURT: Have you had him identify the document? Suppose you have him mark it for identification so we will know what we are talking about.

MR. CAVINESS: I will have this marked for identification.

THE CLERK: Defendant's Exhibit 4 for identification, your Honor.

(Statement marked Defendant's Exhibit No. 4 for identification.)

Q (By Mr. Caviness) What is defendant's Exhibit 4?

A It is a sheet showing the amounts paid by me on that note, for that note, and received by me to be applied against this payment. It also shows a balance.

MR. CAVINESS: We offer then this in evidence, your Honor, as Defendant's Exhibit 4.

TR 61 THE COURT: Subject to the same objection, it will be admitted.
Let me see it.

(Defendant's Exhibit No. 4 received
in evidence, subject to objection.)

Q (By Mr. Caviness) The entry opposite the word "balance"
then is what?

A That is the amount exclusive of interest that is still not paid on
this note.

THE COURT: In other words, you contend the plaintiff owes
you \$2987.75 on that note?

THE WITNESS: Yes, sir.

THE COURT: That is your contention?

THE WITNESS: Yes, sir.

* * *

TR 75 Q (By Mr. Caviness) Mr. Rosden, I would like to read an excerpt
from Plaintiff's Exhibit 7, the next to last paragraph. I read from the
translation that was filed with the original German document?

"All mutual claims of any sort and based upon any legal title
which Doctor Rosden may assert against Mr. Leuthold and
vice versa are hereby discharged."

Now, with respect to that statement, that sentence, let me ask you: In
the negotiations prior to the execution of this 1954 document, was there
any reference or any mention of the sums still due you at that time
against the 1950 note?

THE COURT: Just a minute.

MR. BAKER: If the Court please, I object to it because it is varying the terms of a written document.

THE COURT: That is what I just had in mind.

You now are getting into the position of attempting to get this witness, the defendant, to tell you what was meant in effect by that particular paragraph.

* * *

CROSS-EXAMINATION OF WITNESS ROSDEN

TR 79 Q Mr. Rosden, how long have you been a member of the bar of this Court? Since what date?

A I think it was May '44 or May '45.

Q And you have been engaged in the active practice of law since your admission to this Court? A Yes.

Q Here in the District of Columbia? A Right.

Q And internationally? A Right.

Q Now, you were engaged in the practice of law elsewhere prior to the time that you were admitted to the bar of this Court, were you not? A No.

Q Will you tell us, please, what your occupation was prior to the time that you became a member of the bar of this Court? Or profession?

A I was, what might be called an assistant junior judge in Germany,
TR 80 and then practiced as a foreign exchange counselor in Germany.

Q And would you give us the approximate years or period of time that these activities cover? A From 1929 to 1935. Beginning of 1935.

Q And from 1935 until 1944 what was your occupation or profession?

A I was a year in England concerning myself with business matters, not professional matters, then came to the United States in 1937, and was first in business in New York, later an accountant in the District of Columbia until I became a member of the bar.

Q Did you remain in the United States from 1937 forward?

A Except for trips abroad on business, yes. From 1937 forward?

Q Yes. A (Nodding in affirmative.)

* * *

REDIRECT EXAMINATION OF WITNESS ROSDEN

TR 95

Now, if you want to modify it or if you want to add to the statement, or explain it, you may do so.

THE WITNESS: I shall do so, although I don't think it is a modification.

When Mr. Leuthold joined Doctor Dessauer and me, Doctor Dessauer explained to Mr. Leuthold what arrangements had been reached with me by him. I don't think that is a modification of what I said before, but it should be added, I think.

Q (By Mr. Caviness) And Mr. Leuthold was present at the signing, is that correct? A Yes.

MR. CAVINESS: No further questions.

THE COURT: Let me see if I understand your position correctly, Mr. Rosden.

This note, apparently, these payments that were made, were made toward the money that was advanced or given to you by the plaintiff to buy these paintings, is that correct?

TR 96 THE WITNESS: Not quite, your Honor. The paintings were bought by me according to an agreement with the plaintiff that he would furnish me the money for the purchase of these paintings.

THE COURT: Did he furnish you the money?

THE WITNESS: He did furnish me the money.

THE COURT: Thirty-three thousand dollars?

THE WITNESS: Correct.

THE COURT: And you bought the paintings for \$33,000?

THE WITNESS: Correct.

THE COURT: You had one of them insured for \$25,000, right?

(The witness nodded in the affirmative.)

THE COURT: And the other three for approximately \$12,000, was that your testimony?

THE WITNESS: I think it was eight or ten.

THE COURT: At any rate, the insurance was more than you actually paid the plaintiff?

THE WITNESS: That is right.

THE COURT: You paid \$33,000 for the paintings?

THE WITNESS: That is right.

THE COURT: Where did you buy the paintings?

THE WITNESS: In Germany.

THE COURT: You still have the paintings?

TR 97

THE WITNESS: That is right.

THE COURT: They are now yours?

THE WITNESS: Well, whether they are mine or whether they are partly impeded or in favor of the plaintiff, that is of course another question.

THE COURT: Now, was it your testimony -- I am sure you said this -- to the effect, according to the law in Switzerland, you were advised and told by Doctor Dessauer if you didn't sign this agreement or agree to make these payments, that agreement of May 1954, you would either be detained or arrested for this debt that you allegedly owe?

THE WITNESS: Right.

THE COURT: Your position is that because of those threats and acts of duress, coercion, call them what you will, but that is what you claim they amount to, you signed this agreement?

THE WITNESS: That is right.

THE COURT: And if it had not been for what you were told, and

because of your state of mind, not wanting to be apprehended or detained in Switzerland or maybe put in jail, you would not have signed this agreement of May 1954, is that your position?

THE WITNESS: That is my position.

TR 98 THE COURT: Is it the law in Switzerland that all a person has to do over there to have somebody picked up off the street is to go to the authorities and say that John Brown owes me a thousand dollars, he is going to leave the country, therefore I want him picked up and detained and put in jail without any trial whatsoever? Is that the law in Switzerland?

THE WITNESS: I have heard -- In the first place, that isn't what I was told at the time was the law. What I was told amounted to filing suit, alleging, probably under oath, that I was about to leave the country and that a debt was owed, and that then a personal attachment could be issued preventing me from leaving the country before putting up a collateral.

THE COURT: That is what you were told?

THE WITNESS: That is what I was told.

Now, whether it was true, I believed at the time it was true because I know in another country that that is possible. I have only found out since that it is not true.

THE COURT: Now, that is for a civil transaction? Owing money?

THE WITNESS: That is right.

THE COURT: We are not talking about the commission of a crime. We are talking about a civil matter?

THE WITNESS: That is right.

THE COURT: You were in Switzerland at the time this happened?

THE WITNESS: That is right.

TR 99 THE COURT: In other words, you agreed to sign this agreement because of the threats that were made?

THE WITNESS: Right.

THE COURT: That is your whole defense?

THE WITNESS: That is my whole defense, yes, sir.

THE COURT: Now, where were you on or about October 31st, 1954, which is the first date set forth in the agreement of May 1954, at which time you were supposed to pay or did pay \$2,000? Where were you on or about that day?

THE WITNESS: I can't say for sure. But probably in the United States.

THE COURT: Now, you were still under the thought while you were in the United States in October of 1954 -- and that was the first payment that you were going to make on this agreement, correct?

THE WITNESS: Yes.

THE COURT: So that you were not in Switzerland, as you were when the agreement was signed, but here you were in a free country of

the United States of America. Didn't you know that if you didn't make that payment that you couldn't be arrested in the United States or be extradited to Switzerland?

TR 100 THE WITNESS: Of course I knew. I didn't have that to fear at all. What I had to fear at that time was that I would have had to let the note go to protest, which I had never done in my life before.

THE COURT: What do you mean, "go to protest"?

THE WITNESS: Well, the notes were sent to a bank here in -- National Metropolitan Bank, usually, and the National Metropolitan Bank would come in and present the note to me for payment. Then I would have had to refuse payment and the natural consequence of that is that the note is being protested.

Now, such a protest is something that goes into every credit report. And everything else is excused. I didn't feel -- I didn't check into the thing.

THE COURT: Well now, let's assume that you refused to pay the \$2,000 in October 1954 and the note went to protest and that you were sued in this country, as you have been in this case. You know as a lawyer, do you not, that you would have had a right to have gone into a court of equity and law and set forth this very same defense that you are now setting forth in this transaction? You know that?

THE WITNESS: Right.

THE COURT: And you would have had a right at least, or the lawyer, to your day in court?

THE WITNESS: Right.

THE COURT: And if the court or the jury found that you made
TR101 that agreement as a result of duress and that that was the law in Switzerland at the time, therefore it was not a valid contract, or at least voidable, you knew or you had reason to believe, did you not, that if you protested or refused to pay the first \$2,000, you could try that issue out in a court in this country?

THE WITNESS: That is right. The only trouble would have been that two or three or four years it would have taken, I would have had about a dozen protests and I would have been under a cloud, credit-wise.

THE COURT: Suppose you would have been under a cloud; aren't you under a cloud now that you have notes protested?

THE WITNESS: Yes. Only at that time I had sufficient funds to pay rather than to be under a cloud. Only when the time came that I did not have sufficient funds to pay further did I check into the thing and found I had a legal defense towards payments under Swiss law and did make the defense.

THE COURT: In other words, your testimony amounts to this: that rather than fight this matter in a court of law in the United States, beginning in October 1954, all the way through to April '56, rather than

take advantage of any legal rights you might have had in connection with any protest that might have been filed or made, you would have rather, TR102 and you did, go ahead and voluntarily made these payments? That is your position?

THE WITNESS: That is correct.

THE COURT: I am asking the questions, Mr. Counselor.

Is that your position?

THE WITNESS: That is my position. With the one addition: that I was afraid of the impediment to my credit, had I not paid it.

THE COURT: What do you mean, the impediment to your credit?

THE WITNESS: If you have a protest against you, naturally that goes into every Dun & Bradstreet or any other credit report. And that isn't good for a lawyer, as it isn't good for a lawyer to be in court in personal matters at all. And I didn't want to do that as long as I had enough money and I figured all right, some day in the future I may recover it out of the paintings.

THE COURT: How were you going to recover it after you once paid it out?

THE WITNESS: By sale of the paintings; hoping to sell them so that I could recover.

THE COURT: Is it your testimony that the reason you didn't pay

the last two payments or three payments, was it because you then found out that under the Swiss law they couldn't do what they alleged they were going to do with you over there when you first made the TR 103 agreement, or was it because you didn't have the money to pay? Which was it?

THE WITNESS: The fact that I didn't have money to pay caused me to check into it, check into the Swiss law.

THE COURT: How did you check into the law?

THE WITNESS: I got myself a Swiss Code of Obligations, and started reading. And when I found out that it has these provisions that presumably will be shown later, I did protest, did let the notes go to protest.

THE COURT: Let me ask you this: When you got back into the United States in October or after this agreement was signed, you must have had or you apparently had some doubt in your mind as to whether or not the authorities in Switzerland could do what the Doctor Dessauer told you could be done. Didn't you have some doubt in your mind that could be done?

THE WITNESS: No, because I did know, your Honor, that the same thing can be done in Holland because I had encountered that in my practice.

THE COURT: You didn't think you could investigate the authorities or look through the Code?

THE WITNESS: I thought at the time that what Dessauer told me was the truth, namely, that it was possible to bring what is called in Europe a personal attachment. And therefore the question was not whether I had been deceived at all, but whether I had been threatened, TR104 and threat with the legal action that is legally permissible is usually not considered to be a threat in Europe. That entitles me to avoid something.

THE COURT: But the point is that here you are back in the United States before you parted with any of your good money. You hadn't paid one dime on this agreement. You were back in this great, free country of ours, where you knew your rights would be protected -- I am not indicating there aren't any other free countries -- but at least you would get a trial before an impartial jury. All right, you would have your day in court in this country; but instead of seeking your remedy by going into court and objecting in effect the payment of these notes, or these payments that you agreed to pay, you continued from 1954 all the way to 1956 to keep on paying on this agreement which you claim is illegal and void or voidable because of the representations made to you?

THE WITNESS: Yes, your Honor. I could not sue in the United States.

THE COURT: That is all I have.

THE WITNESS: I could not sue in the United States. I could only have sued in Switzerland

THE COURT: But if they had filed suit against you or protested the notes, you could have come into court and set forth your defense as you have in this case, could you not?

TR 105

THE WITNESS: Right.

THE COURT: That is all.

Anything further?

MR. CAVINESS: Not of this witness.

THE COURT: Anything further?

MR. BAKER: I have nothing further, if the Court please.

* * *

DISCUSSION BETWEEN CAVINESS AND COURT

TR 153

MR. CAVINESS: Your Honor, may I say just a word, then, about the counterclaim? That is the counterclaim on the 1950 note.

THE COURT: You have a note coming up, I think maybe you better cover this.

MR. CAVINESS: The counterclaim on the balance due Mr. Rosden for his payment of that \$12,000 note, \$2,987, resulted from, or rather, the arrangement for payment was made between the parties and it was agreed that the payments would be made from the trust fund in Chicago.

THE COURT: Excuse me. In the pretrial proceedings the

TR154 counterclaim sets forth a claim for \$2182.33 with interest from June 1st, 1950, and that results from this note I think we have been talking about.

MR. CAVINESS: That is correct, your Honor. I didn't handle this case in the pretrial. I don't know just how that figure crept in. That was the figure that was used in the answer, by the way.

THE COURT: I think I am bound by this pretrial order here.

MR. CAVINESS: Is it not possible to permit me to move to amend at this point?

THE COURT: Anything is possible, I suppose.

MR. CAVINESS: I intend to, when I finish here, move to amend. This agreement was that Mr. Rosden was to be repaid out of the trust fund which was held in Chicago for payment of United States taxes. Now, that fund was held for a period of seven years, until March 15, 1955. It was released upon that date. From June 1950 until November 1954 regular payments were made. They totaled nine thousand three hundred-some-odd dollars. The balance due from that trust fund was \$2987, which was due Mr. Rosden and should have been paid when the trust was released on March 15, 1955.

The statute of limitations could not apply to this situation, as I understand it, because the balance was to be paid on March 15, 1955.

TR155 The cause of action, in other words, arose on March 15, 1955, for the balance due. Because under the agreement the final payment, if any were left, was to be made when the trust was released by this law firm.

TR 157

Friday, January 9, 1959

(The Court reconvened at 10:00 o'clock a. m.)

Appearances: As previously noted.

THE CLERK: Leuthold versus Rosden.

MR. BAKER: The plaintiff is here.

MR. CAVINESS: The defendant is ready.

THE COURT: All right. In the case of Leuthold versus Rosden, the Court is ready to rule.

TR 158

The Court finds in favor of the plaintiff in the amount of \$4,700 plus interest, costs, and attorney's fee.

The Court also finds in favor of the defendant on its counterclaim in the amount of \$2,182.33.

That is your counterclaim. I am going to find that the amount set forth in the pretrial order --

MR. CAVINESS: You won't entertain a motion to amend?

THE COURT: No.

So you have your counterclaim granted in the amount of \$2,182.33 with interest.

Counsel on each side will have ten days from this date to prepare proposed findings of fact and conclusions of law in accordance with the ruling of the Court.

The question of counsel fees to be awarded the plaintiff will not be ruled upon until the Court has acted on the proposed findings of fact and conclusions of law. In the meantime, counsel for the plaintiff will prepare a memorandum setting forth the time spent in connection with his preparation and trial of this case, together with the various things that he did in connection with the case, which will enable the Court to arrive at a fair fee for counsel for the plaintiff. This must be done within ten days.

That is the ruling of the Court.

(The Court then proceeded to other Court business.)

Filed Jan. 20, 1959

* * *

FINDINGS of FACT, CONCLUSIONS of LAW
and JUDGMENT

This cause came on for hearing on January 7, 8 and 9, 1959, and upon consideration of the pleadings and all of the evidence adduced on behalf of both the plaintiff and the defendant, the Court makes the following:

FINDINGS of FACT

1. The defendant executed and delivered to the plaintiff three (3) bills of exchange totalling Forty-Seven Hundred (\$4700.00) Dollars variously dated May 20, June 20 and July 20, 1956, which said bills of

exchange became due and payable on July 15, August 15 and September 15, 1956, respectively.

2. The bills of exchange referred to above were freely and voluntarily executed and delivered by the defendant to the plaintiff, without mistake on the part of the defendant.

3. No duress, coercion or deception was practiced by the plaintiff, or anyone on his behalf, upon the defendant in procuring the execution and delivery of said bills of exchange.

4. The defendant failed and refused to honor his said bills of exchange and refused to pay the same as they became due and payable.

5. The aforesaid bills of exchange are valid, unpaid and outstanding obligations of the defendant to the plaintiff.

6. Plaintiff is entitled to recover from the defendant the total amount of said bills of exchange, plus interest, costs and an allowance for attorney's fees.

7. Defendant advanced the sum of Twenty-One Hundred Eighty-Two Dollars and thirty-three cents (\$2182.33) for the plaintiff for which defendant has not been reimbursed.

8. Defendant is entitled to recover the sum of Twenty-One Hundred Eighty-Two Dollars and thirty-three cents (\$2182.33) and interest from the plaintiff.

CONCLUSIONS of LAW

1. Plaintiff is entitled to judgment against the defendant in the sum of Forty-Seven Hundred (\$4700.00) Dollars, plus interest, costs and an allowance for attorney's fees.

2. Defendant is entitled to judgment against the plaintiff in the sum of Twenty-One Hundred Eighty-Two Dollars and thirty-three cents (\$2182.33), plus interest, or receive credit for this amount.

JUDGMENT

Accordingly, it is by the Court this 20th day of January, 1959:

ADJUDGED and DECREED:

1. Plaintiff is hereby granted judgment against the defendant in the sum of Forty-Seven Hundred (\$4700.00) Dollars, with interest, and he shall have execution thereon.

2. Plaintiff's attorneys, Lucien H. Mercier and N. Meyer Baker, are hereby allowed the sum of \$1,000.00, as counsel fees for services rendered in this cause and judgment is hereby granted them in this amount, and they shall have execution thereon.

3. Defendant is hereby granted judgment against the plaintiff in the sum of Twenty-One Hundred Eighty-Two Dollars and thirty-three cents (\$2182.33), with interest. The amount of this judgment

in defendant's favor shall be a set-off against and credited against the judgment granted plaintiff in paragraph 1 above.

/s/ John J. Sirica
JUDGE

SEEN:

Attorney for Defendant

Copy of the foregoing mailed postpaid this 14th day of January, 1959 to Robert S. Caviness, 110 C Street, N. W., Washington, D. C., attorney for defendant.

/s/ N. Meyer Baker
Attorney for Plaintiff

Filed Jan. 20, 1959

DEFENDANT'S MOTION TO MODIFY FINDINGS OF FACT AND CONCLUSIONS OF LAW - WITH POINTS AND AUTHORITIES

* * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant agrees that the findings and conclusions proposed by Plaintiff accurately reflect the findings and conclusions of the Court at the termination of the hearing of this cause on January 9, 1959.

Defendant believes certain of said findings and conclusions to be in error and, by separate document filed herewith, respectfully

moves the Court to modify said findings and conclusions prior to entry of judgment.

/s/ Robert S. Caviness
Robert S. Caviness
Attorney for Defendant
110 C Street
Washington 1, D. C.

I certify that a true copy of the foregoing was delivered to the office of N. Meyer Baker, Suite 710 Metropolitan Building, Washington 5, D. C. January 19th, 1959.

/s/ Robert S. Caviness

Filed Jan. 20, 1959

* * *

**MOTION TO MODIFY
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Defendant, by counsel, moves the Court to amend the findings of fact and conclusions of law made at the termination of the hearing of this cause on January 9, 1959, in the following respects:

First

By striking therefrom all references to the allowance of attorney's fees to counsel for Plaintiff.

in defendant's favor shall be a set-off against and credited against the judgment granted plaintiff in paragraph 1 above.

/s/ John J. Sirica
JUDGE

SEEN:

Attorney for Defendant

Copy of the foregoing mailed postpaid this 14th day of January, 1959 to Robert S. Caviness, 110 C Street, N. W. , Washington, D. C. , attorney for defendant.

/s/ N. Meyer Baker
Attorney for Plaintiff

Filed Jan. 20, 1959

DEFENDANT'S MOTION TO MODIFY FINDINGS OF FACT AND
CONCLUSIONS OF LAW - WITH POINTS AND AUTHORITIES

* * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant agrees that the findings and conclusions proposed by Plaintiff accurately reflect the findings and conclusions of the Court at the termination of the hearing of this cause on January 9, 1959.

Defendant believes certain of said findings and conclusions to be in error and, by separate document filed herewith, respectfully

moves the Court to modify said findings and conclusions prior to entry of judgment.

/s/ Robert S. Caviness
Robert S. Caviness
Attorney for Defendant
110 C Street
Washington 1, D. C.

I certify that a true copy of the foregoing was delivered to the office of N. Meyer Baker, Suite 710 Metropolitan Building, Washington 5, D. C. January 19th, 1959.

/s/ Robert S. Caviness

Filed Jan. 20, 1959

* * *

**MOTION TO MODIFY
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Defendant, by counsel, moves the Court to amend the findings of fact and conclusions of law made at the termination of the hearing of this cause on January 9, 1959, in the following respects:

First

By striking therefrom all references to the allowance of attorney's fees to counsel for Plaintiff.

Second

By permitting Defendant to amend his first counterclaim to set forth the true amount thereof as demonstrated by the evidence, to wit, \$2,687.75 and interest.

/s/ Robert S. Caviness
Robert S. Caviness
Attorney for Defendant
110 C Street
Washington 1, D. C.

I certify that a true copy of the foregoing and of the attached Points and Authorities were delivered to the office of N. Meyer Baker, Suite 710 Metropolitan Building, Washington 5, D. C. January 19, 1959.

/s/ Robert S. Caviness

Filed Jan. 20, 1959

* * *

DEFENDANT'S POINTS AND AUTHORITIES

Defendant, by counsel, submits the following points and authorities in support of his motion to modify the findings of fact and conclusions of law made in this cause on January 9, 1959:

First

1. There was no agreement between the parties that either would reimburse the other for attorney's fees.
2. This is not an action in Equity.

3. In the absence of an agreement, and excepting certain types of actions in Equity, attorney's fees are not allowable to either party.

Cahill vs. Bryan, 87 USApp. D. C. 271, 184 F. 2d 277

Van Senden vs. Wilkinson, 64 App. D. C. 174, 76 F. 2d 151

Flaherty, D. C. Practice, § 868 and 849

Second

1. Evidence produced by Defendant at the hearing demonstrated that the true sum of his claim against Plaintiff, resulting from Defendant's payment of Plaintiff's note on June 8, 1950, is \$2,687.75 with interest from that date.

2. The sum of \$2,182.23 specified in the counterclaim obviously resulted from an error in computation.

3. Rule 15(b) of the Federal Rules of Civil Procedure provides that amendments to pleadings should be allowed freely during trial when such amendments aid in presentation of the merits of the action.

Respectfully submitted,

/s/ Robert S. Caviness

Robert S. Caviness
Attorney for Defendant

**DEFENDANT'S MOTION TO AMEND FINDINGS OF FACT AND
JUDGMENT - WITH POINTS AND AUTHORITIES**

Filed Jan. 29, 1959

* * *

**MOTION TO AMEND FINDINGS OF FACT
AND JUDGMENT**

Defendant moves the Court to amend the findings of fact made in case on January 20, 1959, as follows:

Finding 7

By inserting the words "On June 8, 1950" at the beginning of Finding number seven.

Finding 8

By inserting the words "from June 8, 1950" after the word "interest" in Finding number eight.

Defendant further moves the Court to amend the judgment entered in this case on January 20, 1959 by adding the words "from June 8, 1950" after the word "interest" in paragraph numbered three of said judgment.

/s/ Robert S. Caviness
Robert S. Caviness
Attorney for Defendant
110 C Street, NW

I certify that a carbon copy of the foregoing motion and annexed Points and Authorities were mailed, postage paid, to the attorney for Plaintiff, N. Meyer Baker, Suite 710 Metropolitan Building, Washington 5, D. C. this 28th day of January, 1959.

/s/ Robert S. Caviness

Filed Jan. 29, 1959

* * *

DEFENDANT'S POINTS & AUTHORITIES

Defendant submits the following points and authorities in support of his motion to amend the findings of fact and judgment:

1. This Court granted defendant's first counterclaim in the sum of \$2,182.33 "with interest."
2. The counterclaim as set forth in the answer was that plaintiff "... is indebted to defendant in the sum of \$2,182.23 plus interest from June 1, 1950."
3. Defendant produced evidence that said indebtedness arose on June 8, 1950. No evidence was offered by plaintiff on this point.
4. In approving the form of judgment prior to entry defendant assumed that the words "with interest" as used therein meant with interest from the due date, or June 8, 1950. Defendant is now advised by the Clerk's office that "with interest" is generally construed to mean interest from date of judgment.

5. Defendant is entitled to compensation for the loss of use of his funds. The loss commenced June 8, 1950.

" . . . the general rule is that a party is entitled to interest on an amount which he lends to another or advances for his benefit, although nothing was said about interest at the time of the transaction." Corpus Juris Secundum, Interest § 10, Vol. 47, page 22.

" - - - If a debt ought to be paid at a particular time, and it is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment. And if the account be stated, as the evidence went to show was the case here, interest begins to run at once. - - - " Young v. Godbe, 82 US 562, 21 L. Ed. 250.

Above case cited and applied in U. S. v. United Drill & Tool Corp., 87 US App 236, 183 F. 2d 998.

Respectfully submitted,

/s/ Robert S. Caviness

Filed Jan. 30, 1959

* * *

**OPPOSITION TO DEFENDANT'S MOTION
TO AMEND FINDINGS OF FACT AND JUDGMENT**

Plaintiff opposes defendant's motion to amend the Findings of Fact and Judgment in this cause for the following reasons:

1. The Findings of Fact and Judgment in this cause have been entered and determined by the Court.

2. The allowance or disallowance of interest in any cause is within the sound discretion of the trial court:

- (a) Title 28, Section 28-2708, D. C. Code, 1951 Edition.
- (b) Dyker Bldg. Co. v. U. S., 86 U.S. App. D. C.
- (c) Flanagan v. C. H. Tompkins Co., 86 U.S. App. D. C. See Barron and Holtzoff, Volume 3, Paragraph 1194, Note 72.

MERCIER, SANDERS, BAKER & SCHNABEL

By /s/ N. Meyer Baker
Attorneys for Plaintiff

Copy of the foregoing mailed, postpaid, this 30th day of January, 1959, to Robert S. Caviness, Esq., 110 C Street, N. W., Washington, D. C., Attorney for defendant.

/s/ N. Meyer Baker
Attorney for Plaintiff

Filed Mar. 27, 1959

* * *

DEFENDANT'S POINTS ON APPEAL

The trial court erred in the following respects:

- 1. In refusing to permit defendant to amend the amount claimed in his counterclaim from \$2,182.23 to the

correct amount of \$2,687.75. Or, alternatively, in failing to grant defendant judgment for the said correct amount.

2. In granting plaintiff judgment for attorney's fees.
3. In failing to grant defendant judgment for interest on his counterclaim from June 8, 1950.

/s/ Robert S. Caviness
 Attorney for Appellant
 110 C Street
 Washington 1, D. C.

I certify that a carbon copy of the foregoing points on appeal were mailed prepaid to the office of N. Meyer Baker, attorney for appellee, 710 Metropolitan Building, Washington 5, D. C., on the 26th day of March, 1959.

/s/ Robert S. Caviness
 Robert S. Caviness

Filed Feb. 19, 1959

* * *

NOTICE OF APPEAL

Notice is hereby given that George Eric Rosden, defendant above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on January 20, 1959.

/s/ Robert S. Caviness
 Robert S. Caviness
 Attorney for Appellant
 110 C Street, NW
 Washington 1, D. C.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

For the

District of Columbia Circuit

No. 15,153

FILED OCT - 1 1959

Joseph W. Stewart

CLERK

GEORGE ERIC ROSDEN,

Appellant,

v.

A. LEUTHOLD,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

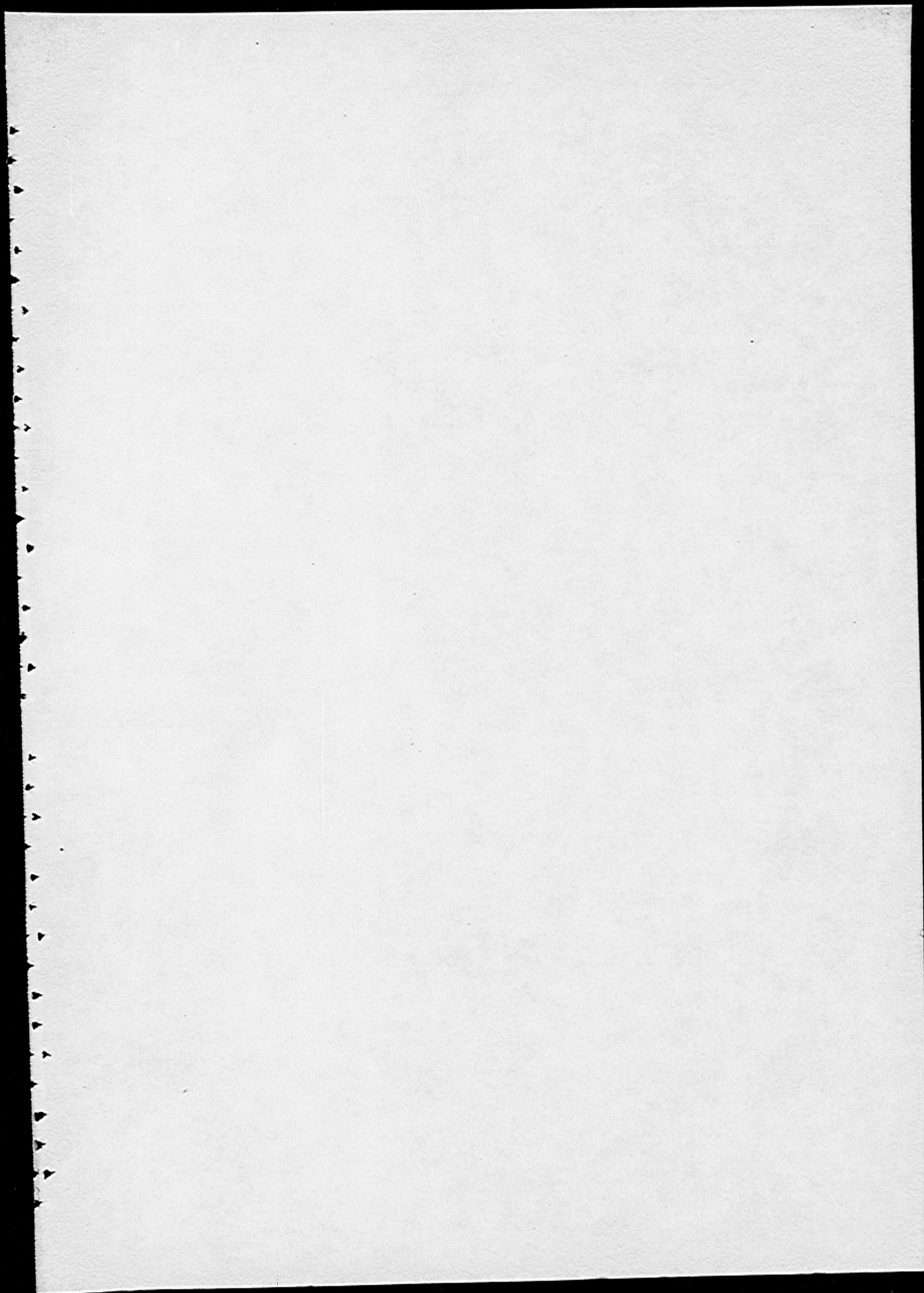
N. MEYER BAKER

613 - 15th St., N.W.
Washington 5, D. C.

Attorney for Appellee

Of Counsel:

Mercier, Sanders, Baker & Schnabel
Suite 710, 613 - 15th St., N.W.
Washington 5, D. C.



(i)

QUESTIONS PRESENTED

Appellee believes that the questions presented in this case are:

First: In the absence of a showing of extraordinary circumstances, was it error for the trial Court to deny appellant leave to amend his counterclaim at the trial of the case when the information tendered in the amendment was available to the appellant for more than four years prior to trial?

Second: Was it correct for the trial Court to allow appellee's counsel attorney fees where the allowance of such fees is in accordance with Swiss law, under which the bills of exchange upon which suit was brought in the court below were executed and delivered?

Third: Was it error for the trial Court to allow interest on the appellant's counterclaim from the date of the Court's judgment when the statute so provides?



(iii)

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 15,153

GEORGE ERIC ROSDEN,

Appellant,

v.

A. LEUTHOLD,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

Appellee believes that a counter-statement of the case is appropriate because of the omission of certain facts which he deems important for the full understanding of this Appeal.

Sometime in 1949, appellant borrowed \$33,000 from the appellee to be used for the purchase of certain paintings which were to be sold in the United States. In the interval between 1949 and May 3, 1954, these paintings had not been sold and appellee demanded the return of the money he had loaned to the appellant. Appellant was not able to

repay this loan in full at that time and, as a result, a written agreement dated May 3, 1954, was entered into between the appellee and the appellant providing for the repayment of the borrowed funds on a monthly installment basis beginning October 31, 1954, and ending on April 30, 1956 (JA 6, 10). Because there had been various transactions between the appellant and the appellee, a mutual release clause was inserted in this agreement which stated as follows:

"All mutual claims of any sort and based upon any legal title which Dr. Rosden (appellant) may assert against Mr. Leuthold (appellee) and vice versa are hereby discharged." (Identification of the parties supplied by counsel)

The scheduled payments were regularly met by the appellant until sometime in March or April of 1956, when the appellant was unable to make the final payment of some \$4,500, which was due on April 30, 1956. At this time a series of three bills of exchange totaling \$4,700 (to include certain costs) were substituted in lieu of the final unpaid installment. These bills of exchange fell due in July, August and September, 1956, respectively, and were not honored by the appellant. As a result, the suit in the Court below was initiated by the appellee demanding payment of these three defaulted bills of exchange totaling \$4,700, plus interest, costs, protests and attorney's fees.

Appellant filed an answer in the Court below claiming that he was justified in refusing to pay the bills of exchange sued upon because he had executed the bills of exchange under duress in Switzerland and that under Swiss law these bills of exchange became void or voidable.

At the same time that the appellant filed his answer below, he filed a counterclaim in the amount of \$2,182.83, plus interest from June 8, 1950. The basis for the counterclaim was for repayment of funds which appellant claimed to have advanced for the appellee as a result of an accommodation endorsement on a defaulted note.

In the course of the trial, appellant sought to increase the amount claimed in the counterclaim to \$2,680.75, plus interest, from June 8, 1950.

Upon the conclusion of the trial, the trial Court found in favor of the appellee for \$4,700, plus an attorney's fee which the Court set at \$1,000 after a hearing upon the allowance of counsel fees. The Court granted the counterclaim of the appellant in the amount of \$2,182.33.

The trial Court ordered counsel for both parties to prepare findings of fact, conclusions of law and judgment.

Both counsel submitted these pleadings and the Court signed those Findings of Fact, Conclusion of Law and Judgment which had been prepared by appellee's counsel.

Thereafter, appellant filed a motion to modify the proposed findings, conclusions and judgment, seeking to have the Court disallow counsel fees and to authorize the increase in the amount of the counterclaim. This motion was denied.

Appellant then filed another motion to amend the Findings of Fact, Conclusions of Law and Judgment so as to allow interest to the appellant on his counterclaim from June 8, 1950.

This motion was likewise denied and this appeal was filed on the 30th day of the thirty days allowed for taking an appeal.

RULES INVOLVED

Rule 16, Federal Rules of Civil Procedure

Local Civil Rule 12, United States District Court for the
District of Columbia

SUMMARY OF ARGUMENT

1. The judgment of the lower Court was correct.

ARGUMENT

1. THE TRIAL COURT WAS BOUND BY THE PRE-TRIAL ORDER, SINCE NO EXTRAORDINARY CIRCUMSTANCES WERE PRODUCED BY THE APPELLANT JUSTIFYING THE EXERCISE OF THE TRIAL COURT'S DISCRETION TO ALLOW AN AMENDMENT TO THE PLEADINGS DURING OR AFTER THE TRIAL OF THIS CAUSE.

The complaint in this cause was filed in the Court below on December 7, 1956. Thereafter, on December 31, 1956, the appellant filed his answer together with a counterclaim for the amount of \$2,182.83. The counterclaim related to transactions occurring sometime around 1950, about five or six years prior to the time the suit was filed in the Court below. At the time that appellant answered the complaint in this cause he had available to him all of the information that it was possible to obtain on this matter. Any difference in the amount or in the computation was a result of the appellant's own neglect and indifference.

On the pretrial of this cause leave was granted to appellant to assert a new and different claim. This was one for damages for interest accruing for alleged fraud practiced upon the appellant.

Rule 16, Federal Rules of Civil Procedure, relates to the pre-trial procedure and the formulation of issues for the trial of any cause. It states, in part, as follows:

"In any action, the Court may in its discretion direct the attorneys to appear before it to consider:

* * * * *

"(2). The necessity or desirability of amendments to the pleadings.

* * * * *

"The Court shall make an order which recites the action taken at the pretrial conference, the amendments allowed to the pleadings and the agreements made by the parties as to any of the matters considered and which limits the issues for trial to those not disposed of

by admissions or agreements of counsel;
and such an order when entered controls the
subsequent course of the action, unless
modified at the trial to prevent manifest in-
justice * * *" (Underscoring supplied by
 counsel).

Rule 16, Federal Rules of Civil Procedure
 Local Civil Rule 12 (Mandatory Pretrial)

BARRON & HOLTZOFF, Federal Practice
 and Procedure, Vol. 1, para. 473, page 964.

Thus, in the intervening 21 months between the time that the appellant filed his counterclaim in this cause and the date of the pre-trial order he had ample opportunity to ascertain and determine the kind and quality of the evidence that he would produce at the actual trial of this cause. More particularly was this true because of the age of the evidence and the fact that it was in the sole possession of the appellant and had been for nearly four years. In fact, the details of this evidence were sought from the appellant when his deposition was taken by appellee on February 27, 1957. Appellant promised to furnish this evidence to appellee, but he failed to do so. In addition, the basis of the counterclaim was barred by the mutual release between the appellant and the appellee set forth above in the Counter-Statement of this case.

The trial Court was clearly correct in holding that he was bound by the pre-trial order. He saw no justifiable reason to exercise his discretion.

Rule 16, Federal Rules of Civil Procedure
 ZIELINSKI v. PHILADELPHIA PIERS,
 139 Fed. Supp. 414

BARON AND HOLTZOFF, Vol. 1, para. 446,
 page 887, 891

CANISTER CO. v. NATIONAL CAN CORP.,
 6 F. R. D. 613

STEWART WARNER CORP. v. STALEY,
 2 F. R. D. 446

2. THE ALLOWANCE OF INTEREST FROM THE DATE OF JUDGMENT WAS CORRECT.

The granting of interest runs from the date of judgment. BARRON AND HOLTZOFF, Federal Practice and Procedure, Vol. 3, para. 1194, page 40, note 72. D. C. CODE, 1951 Edition, Title 28, Section 28-2708.

However, the granting or denying of interest is within the sound discretion of the trial Court.

OWENS v. SCHWARTZ, 85 U.S. App. D.C. 302

DYKER BUILDING COMPANY v. U. S.,
86 U.S. App. D.C. 302, 303

FLANAGAN v. C. H. TOMPKINS CO.,
86 U.S. App. D.C. 308

Thus, by statute and rule of court, the allowance of interest from the date of judgment was correct.

3. THE ALLOWANCE OF ATTORNEYS' FEES WAS PROPER AND IN ACCORD WITH SWISS LAW, UNDER WHICH THE BILLS OF EXCHANGE WERE MADE.

The bills of exchange which were the basis of the appellee's claim against the appellant had been delivered in Switzerland and were controlled by the law of that country. Swiss law, like English law, makes provision for the allowance of counsel's fees as part of the costs of litigation and grants such allowances to the prevailing party. See BARRON AND HOLTZOFF, Federal Practice and Procedure, Volume 3, para. 1197, page 65. Thus, not only was it appropriate for the trial Court to award the counsel fees to appellee's counsel but this was in accord with the settled law of Switzerland. See THE BANK OF THE UNITED STATES v. THE UNITED STATES, 43 U.S. 734, 11 L.Ed. 449; ALLEN v. KEMBLE, 6 Moore P.C. 314, 13 Reprint 704; 8 CORPUS JURIS, para. 1450, page 1108, note 69.

The testimony in this cause clearly showed that the appellant was well-grounded in legal procedure in Europe and the United States and had wide legal knowledge; he having been a junior judge in Germany prior to his coming to the United States of America (JA 18). On his arrival in America he practiced accountancy and thereafter became a member of the Bars of this Court, the trial Court below and the United States Supreme Court. He had practiced law in Europe and was familiar with the laws of the various countries there. He knew, as any ordinary business man, and aside from his wide and extensive legal training (JA 18, 19) that when he entered into the agreement of May 3, 1954, he settled for all time all of his differences with the appellee and left outstanding only the payment of the series of bills of exchange totalling \$4,700.00, upon which suit was finally brought. He knew that this was his sole obligation to the appellee and once these written financial obligations had been paid he would have settled all accounts with the appellee (JA 6, 10, 12).

Despite the foregoing, appellant attempted to confuse the trial Court below in claiming that the appellee had made payments on the account of the counterclaim as late as November 5, 1954, by means of a letter he had received from his appellant's attorneys in Chicago holding escrow funds that once belonged to appellee. These funds belonged to appellant. They were not paid to appellant by the appellee nor under appellee's direction but were submitted in evidence by appellant for the sole purpose of attempting to bring his counterclaim within the three-year Statute of Limitations. Appellant's testimony on this score was of no greater weight than that relative to his testimony that he had been defrauded in Switzerland and compelled under duress to execute the bills of exchange upon which the suit was brought in the Court below (JA 21-29). Appellee respectfully submits to this Court that the granting of the counterclaim was based on flimsy, highly questionable and misleading testimony presented before the trial Court. Such testimony was, appellee believes, worthless and should not have been considered by the trial

Court by virtue of the clear and unambiguous language of the mutual release which the appellant had agreed to and ratified by all but one final payment under his Agreement of April 3, 1954.

4. FINDINGS OF A TRIAL COURT WHEN SUSTAINED BY THE EVIDENCE WILL NOT BE SET ASIDE ON APPEAL UNLESS CLEARLY ERRONEOUS.

For more than fifty years this Court has consistently adhered to the above stated principle.

BRAINERD v. BUCK, 184 U.S. 99, 46 L.Ed. 449,
affirming judgment in 16 App. D.C. 595.

HOPP v. CALLOWAY, 52 App. D.C. 3,
280 Fed. 877

BOTELER v. PLUGGE, 57 App. D.C. 69,
17 F 2nd 221

CAPITAL APARTMENT CORPORATION v. VASSOS,
62 App. D.C. 136, 65 F 2nd 482

UNITED STATES v. U. S. GYPSUM COMPANY,
333 U.S. 364, 92 L.Ed. 746, Rehearing
denied, 333 U.S. 869, 92 L.Ed. 1147

COLBY v. RIGGS NATIONAL BANK, 67 App. D.C. 259,
92 F 2nd 183, 114 A.L.R. 1065

CONSOLIDATED REALTY CORP. v. DUNLOP,
114 F 2d 16, 72 App. D.C. 273

See Rule 52(a) F.R.C.P.

**APPELLEE'S REQUEST FOR INTEREST, DAMAGES
and DOUBLE COSTS BECAUSE THIS APPEAL
TAKEN FOR DELAY**

For the foregoing reasons appellee claims damages in the amount of 10% of the amount of \$4,700 - this being the amount of the judgment of the Court below in the favor of the appellee - plus interest at 6% from the date of the judgment which is January 20, 1959, plus the allowance of double costs on appeal as provided for under Rule 23 of this Court because this appeal has delayed the proceedings on the judgment of the lower Court and appears to have been sued out merely for delay.

CONCLUSION

Appellee respectfully represents to this Court that the rulings of the trial Court, its Findings of Fact and Judgment were correct, amply supported by the evidence and should be affirmed. Appellee respectfully requests also that this Court grant him the interest, damages and double costs requested in this matter.

Respectfully submitted,

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United States Court of Appeals
For the
District of Columbia Circuit

FILED OCT 26 1959

REPLY BRIEF FOR APPELLANT

Joseph W. Stewart

CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,153

GEORGE ERIC ROSDEN,

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A. LEUTHOLD,

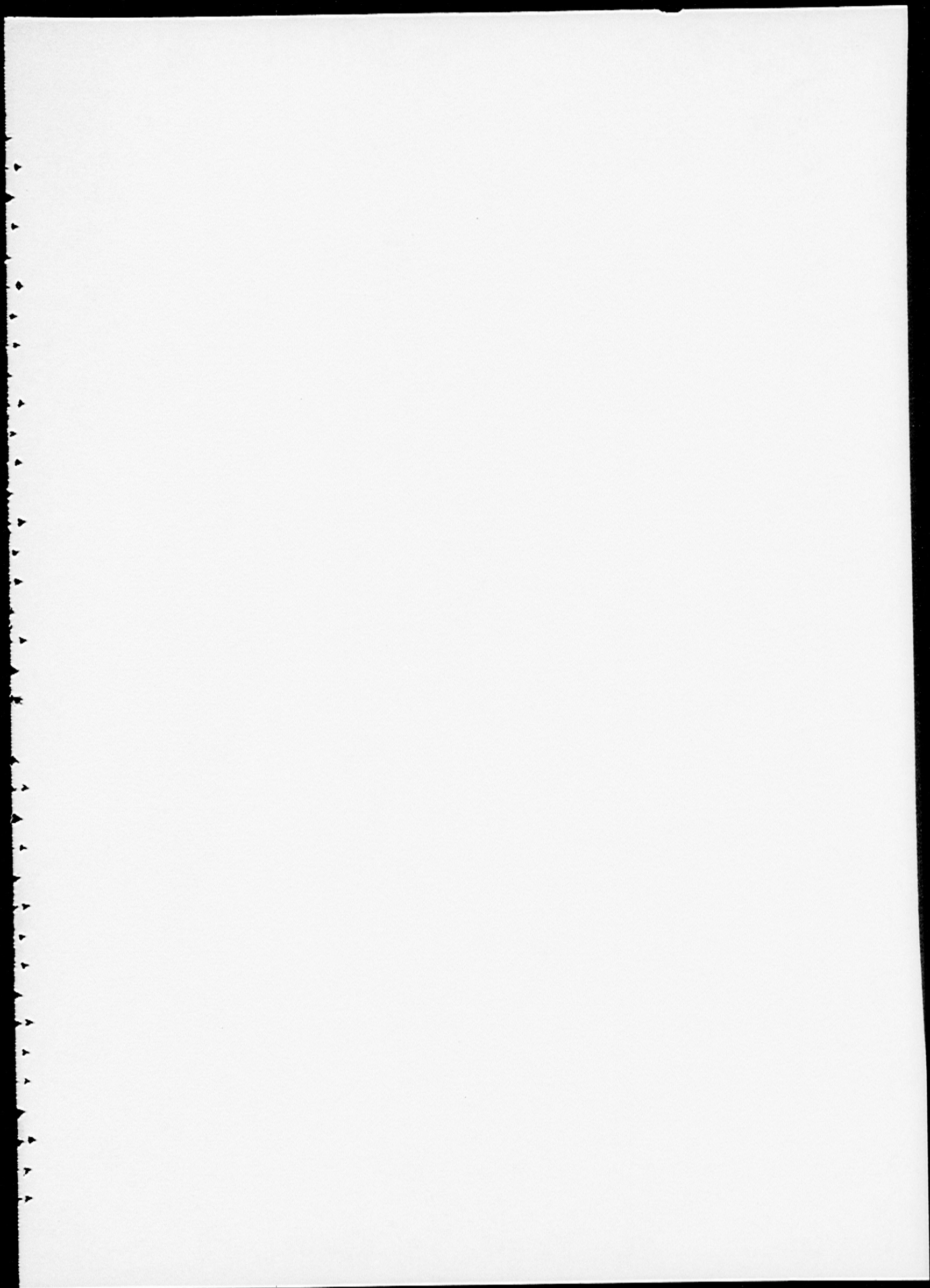
Appellee.

APPEAL FROM JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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Washington 1, D. C.

Counsel for Appellant



UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 15153

GEORGE ERIC ROSDEN,

Appellant,

v.

A. LEUTHOLD,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S REPLY BRIEF

Reply to appellee's first argument --- That the trial court acted properly in refusing to permit appellant to correct the error in his counterclaim, and in refusing to grant judgment for the correct amount.

In his answer appellant asserted a counterclaim for " . . . \$2,182.23 plus interest from June 1, 1950 . . . " In preparing for trial it was discovered that appellant or his secretary had erred in figuring the amount. The true amount due was \$2,687.75. Uncontested evidence of the correct amount was produced at the trial.

Appellee's first argument is in three parts. First he states that the trial court was bound by the pretrial order. Appellee relies on Rule 16, F.R.C.P., which states that a pretrial ". . . order when entered controls the subsequent course of action, unless modified at the trial to prevent manifest injustice."

Can there be any more "manifest injustice" than to hold a party to a mathematical error discovered after pretrial and corrected at trial? This was an error in pleading. Rule 15 b states that pleadings may be amended to conform to the evidence ". . . at any time, even after judgment . . ." Rule 54 c provides that the judgment shall grant the relief to which a party is entitled, even where he did not demand such relief in his pleadings.

It seems obvious, in light of Rules 15 b and 54 c, that Rule 16 was not intended to mean that errors in a pretrial order can not be changed in the course of trial. Pretrial procedure was intended to promote litigation on the merits. It should not be used ". . . to thwart its very objective." Moore's Federal Practice, §16.20.

The second part of appellee's first argument appears to be that appellant should be barred from amending his counterclaim because of negligence in mistating the amount in the answer.

The error occurred through a simple transposition in subtraction. It was not discovered until exhibits to be used at trial were examined by counsel. Surely this is not negligence of such high degree as to warrant a penalty of \$500.

The third part of appellee's first argument is that the counterclaim was barred by a mutual release signed by the parties May 3, 1954. This contention was advanced in the trial court and rejected. There was ample evidence that the release did not relate to the separate transaction out of which the counterclaim arose.

The nub of the question for this Court is --- is a trial court bound by a pretrial order stating one amount in the face of undisputed evidence that the amount so stated is erroneous? That is, are Rules 15 b and 54 c meaningless after a pretrial order is entered?

REPLY II

Reply to appellee's second argument --- That the trial court acted properly in refusing appellant interest on his counterclaim from June 8, 1950.

The counterclaim resulted from a note made by appellee and endorsed for accomodation by appellant. When the note came due on June 1, 1950 appellee Leuthold failed to pay it. On June 8, 1950, appellant Rosden paid the principal of \$12,000 plus interest and costs of \$311.29. From June 1950 to November 5, 1954 Leuthold made partial payments to Rosden against this indebtedness totalling \$9,623.45, leaving due Rosden the sum of \$2,687.75 plus interest from June 8, 1950. There was no issue raised by appellee at the trial as to the amount due Rosden. The amount of indebtedness was fixed and determined by the evidence.

Appellee says the allowance of interest on the counterclaim was within the discretion of the trial court. He cites §28-2708 of the D. C. Code, which does place discretion as to the allowance of interest in the trial court in actions " . . . to recover damages for breach of contract . . . "

But appellant's counterclaim was for a liquidated debt (\$2,687.75 plus interest from June 8, 1950) and §28-2707 of the D. C. Code provides as follows:

"In an action in the District Court of the United States for the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by contract, if any, until paid." Underlining supplied.

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Obviously if Rosden had sued Leuthold for the sum in issue the action would have been brought in debt, not for breach of contract.

The term "liquidated debt" is defined in Bovier thusly: "A debt is such when it is certain what is due and how much is due." See, to same effect, definitions in 25 Words & Phrases 363, 364 and pocket parts.

That interest was payable to Rosden "by law or usage" is indicated by the authorities cited in appellant's first brief, page 5, and in District of Columbia v. Metropolitan Railroad Co. 8 App. D. C. 322, affirmed 195 U. S. 322, 49 L. Ed. 219, 25 Sup. Ct. 28, the following excerpt being from Judge Morris' opinion at page 376:

"We think it may be stated as the general rule of the common law of our country . . . 'that if a debt ought to be paid at a particular time, and it is not then paid, through the default of the debtor, compensation in damages, equal to the value of the money, which is the legal interest upon it, shall be paid during such time as the party is in default.' See American Leading Cases, vol. 1, 616, where the cases upon the subject are collated and discussed. And this rule has received the approval of the Supreme Court of the United States. Loudon v. Shelby County, 104 U. S. 771; Chicago v. Tebbetts, 104 U. S. 120; Young v. Godbe, 15 Wall. 562; Curtis v. Innerarity, 6 How. 146. It is true that, in order to be allowed, it should be claimed in the declaration; but when it is so claimed, there can be no doubt of the right of the plaintiff, upon a proper showing, to recover interest as well as principal."

Appellant's counterclaim falls clearly within the provisions of §28-2707. The debt was liquidated, interest is required by law, and interest was claimed in the counterclaim. The statute provides that the judgment shall include interest from the due date. The trial court had no discretion in the matter. The refusal of interest was error.

REPLY III

Reply to appellee's third argument --- That the trial court acted properly in granting appellee \$1,000 for attorney's fees.

Appellee's argument is that the bills of exchange upon which the complaint was based were delivered in Switzerland, therefore they are controlled by Swiss law, which law authorizes the allowance of attorney's fees as an element of cost.

There is no evidence in the record of this case to support appellee's statement of the Swiss law. Although two experts on Swiss law appeared in the trial court, neither were questioned as to the Swiss law concerning the allowance of attorney's fees as costs or as damages.

However, even if appellee's statement of the Swiss law were correct, that law would avail him nothing in this case. If the bills had been both delivered and payable in Switzerland, there might be some merit to appellee's contention. But such was not the case. The bills were payable in the District of Columbia (Complaint, JA-2).

A bill of exchange executed or delivered in one state or country and made payable in another state or country is, by universally accepted rules of conflicts of law, governed by the law of the place of payment, the lex loci solutionis. 10 Corpus Juris Secundum, Bills & Notes §49; Wiseman v. Chiappella, 64 U.S. 368, 16 L. Ed. 466; Indseth v. Pierce, Fed. Case No. 7,026, 7 Reporter 675, affirmed 106 U.S. 546, 1 S. Ct. 418, 27 L. Ed. 254; U.S. v. Guaranty Trust Co., 293 U.S. 340, 79 L. Ed. 415; Cook v. Moffat, 46 U.S. 295, 316, 12 L. Ed. 159.

This rule is specifically applicable to the measure of damages. A bill of exchange is a contract. The "place of performance" of a bill or note is the place of payment. 8 Corpus Juris, Bills & Notes, §153; Restatement of Conflict of Laws, §§355 and 416. The right to and measure of damages for breach of a contract are determined by the law of the place of performance --- in this case the District of Columbia. Restatement of Conflict of Laws, §§372, 413 and 416.

The law and practice in the District of Columbia preclude the allowance of attorney's fees in cases such as this. (Authorities cited on page 4, Appellant's main brief) The trial court erred in including an allowance for attorney's fees in the judgment.

CONCLUSION

Appellant again respectfully suggests to this Court that the trial court erred on each of the three counts discussed in this and his prior brief. Appellee's plea for interest and double costs under Rule 23 is so obviously inept it requires no argument.

Respectfully submitted,

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Counsel for Appellant

